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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

CHARLES W. LAWRENCE, JR.,
JOSEPH A. BERTUCCI and
NORAH S. BERTUCCI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the decision of the Seventh Circuit Court of Appeals, which allows the sentencing court to consider as part of the victim impact statement the dollar amounts relating to counts upon which petitioners were acquitted, in conflict with this Court's decision in *Hughey v. United States?*

LIST OF PARTIES BELOW

The United States of America and the petitioners, Charles W. Lawrence, Jr., Joseph A. Bertucci and Norah S. Bertucci, were the parties to the proceeding in the court whose judgment is sought to be reviewed.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Charles W. Lawrence, Jr., Joseph A. Bertucci and Norah S. Bertucci, respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on June 10, 1991.

OPINIONS BELOW

The opinion in the United States Court of Appeals for the Seventh Circuit is *United States v. Lawrence*, which is reported at 934 F.2d 868 (7th Cir. 1991), and is reproduced in the appendix to this petition. The opinion in the United States District Court for the Eastern District of Wisconsin is *United States v. Bertucci*, which is reported at 730 F. Supp. 1483 (E.D. Wis. 1990), and is reproduced in the appendix to this petition.

JURISDICTIONAL GROUNDS

The decision upon which petitioners seek review was entered June 10, 1991. Judgment was entered the same date. This court has jurisdiction to review the decision below pursuant to Title 28 of the United States Code, section 1254 (1).

STATUTES INVOLVED

Petitioners were convicted of violating the following statutes:

Title 18 of the United States Code, section 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a

misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 26 of the United States Code, section 7206 (1):

Any person who —

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; ...

....

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Title 26 of the United States Code, section 7206 (2):

Any person who —

Aid or assistance. — Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document which is fraudulent or is false as to any material

> matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document; ...
>
> ....
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation) or imprisoned not more than 3 years, or both, together with the costs of prosecution.

The court imposed sentence pursuant to Title 18 of the United States Code, section 3577 (renumbered as Title 18 of the United States Code, section 3661), which provides as follows:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

STATEMENT OF THE CASE

This case arises out of a criminal tax prosecution relating to calendar years 1982, 1983 and 1984. The petitioners are business partners in two adult bookstores, one in Milwaukee, Wisconsin, and one in Oshkosh, Wisconsin. Joseph Bertucci and Norah Bertucci also are husband and wife. The petitioners were involved in corporations as well as a partnership.

Both bookstores contained a number of private film booths in which customers could view "adult" films by inserting a quarter or a metal token into the booths' metal coin boxes. The government theorized that the petitioners "skimmed" money from their operations by failing to report for tax purposes the true amount of proceeds from the film booths.

In a twenty-five count indictment, the grand jury charged the petitioners with one count of conspiring to impede the Internal Revenue Service, plus twenty-four substantive tax charges arising out of their business ventures and their individual returns. The substantive charges alleged only that petitioners filed false returns, not that they evaded or attempted to evade taxes. Each individual petitioner was charged with twelve substantive counts in addition to the conspiracy count. The United States District Court for the Eastern District of Wisconsin had jurisdiction pursuant to Title 18 of the United States Code, section 3231.

After fourteen days of trial and three days of deliberations, the jury returned its verdicts. Out of a total of twenty-five counts in the original indictment, petitioners were acquitted on fourteen counts. Those counts included all charges relating to the petitioners' partnership and personal income tax returns. In addition, Norah Bertucci was acquitted on two counts involving corporate returns.

All three petitioners were convicted of conspiring to impede the Internal Revenue Service (Count 1) in violation of 18 U.S.C. § 371. Charles Lawrence was also convicted of filing false corporate income tax returns (Count 8) in violation of 26 U.S.C. § 7206 (1), and aiding or assisting in preparing false corporate income tax

returns (Counts 11, 13, 15, 17 and 19) in violation of 26 U.S.C. § 7206 (2). Joseph Bertucci was convicted of filing false corporate income tax returns (Counts 10 and 12) in violation of 26 U.S.C. § 7206 (1), and aiding or assisting in preparing false corporate income tax returns (Counts 9, 15, 17 and 19) in violation of 26 U.S.C. § 7206 (2). Norah Bertucci was convicted of filing false corporate tax returns (Counts 14, 16 and 18) in violation of 26 U.S.C. § 7206 (1), and aiding or assisting in preparing false corporate income tax returns (Count 13) in violation of 26 U.S.C. § 7206 (2).

Prior to sentencing, petitioners became aware that the presentence report included information relating to the counts upon which petitioners were acquitted. Particularly troubling to the petitioners was the information that the government intended to ask the court to determine for sentencing purposes the dollar amount of the taxes evaded, including the dollar amounts resulting from the acquitted counts. In the presentence report, the government asked the court to take into account all of the allegedly unreported income and unpaid taxes, including that from the partnership and personal returns, on which counts petitioners were acquitted.

Petitioners filed motions pursuant to Federal Rule of Criminal Procedure 32 (c) (3) (D) challenging the presentence reports' inclusion in the victim impact section of alleged unreported income taxes relating to counts on which the defendants were acquitted. Petitioners asked the court to either exclude the objectionable material for sentencing purposes or make findings as to the amount of taxes being considered because the amount of the taxes evaded will affect the petitioners' parole eligibility.

According to the parole guidelines, if the amount of taxes a defendant in a given case evaded or attempted to evade is between $40,000 and $200,000, that defendant falls into Category Four and is eligible for parole after serving twelve to eighteen months of a sentence. If the amount involved is between $2,000 and $40,000, the defendant falls into Category Three and is eligible for parole after zero to ten months.

Depending upon the factors and adjustments used, the dollar amount for each of the petitioners in this case varied from the high end of Category Three to the low end of Category Four to the high end of Category Four. The parole commission uses the sentencing court's conclusions as to the dollar amounts considered for sentencing purposes to determine when a defendant will be paroled. Thus, if the range is from twelve to eighteen months and the defendant's dollar amount is toward the lower end of the $40,000 to $200,000 range, the defendant will be paroled closer to twelve months than eighteen months.

The district court held a hearing pursuant to Federal Rule of Criminal Procedure 32. After each party filed supplemental briefs, the court issued a written decision concluding that it could consider all evidence presented at trial, including the evidence relevant to the acquitted counts.

After the post-trial motions were denied, the petitioners were sentenced on March 8, 1990. At sentencing, petitioners again raised the victim impact issue and pointed out that Rule 32 requires the court to make findings as to the challenged material. The government joined in the petitioners' view that Rule 32 requires the court to make findings, and specifically asked the court to find that "column one" of a sentencing exhibit listed the appropriate tax figures for sentencing purposes.

Despite the urging of both parties, the court did not make any finding other than to adopt the government's figures in column one of the exhibit, or $191,000, as the victim impact amount for sentencing purposes. In so doing, the court said that "[t]o do anything else would require me to go through all of the evidence that was presented during the entire trial and retry the case." In response to defense counsel's request for clarification, the district court judge acknowledged that he was not going to base the decision on his own review of the evidence. The court simply adopted the government's position, without independently reviewing the evidence and making the findings required by Rule 32.

Joseph Bertucci was sentenced to twenty-four months on all counts except Count 1, each sentence to run concurrently for a total of twenty-four months' imprisonment. As to Count 1, imposition of sentence was suspended, and Bertucci was placed on probation for three years to commence upon his release from confinement. He was fined $40,671.44 with a special assessment of $150.00. Norah Bertucci was sentenced to eighteen months' imprisonment on each count except Count 1. As to Count 1, imposition of sentence was suspended and she was placed on probation for three years to commence upon her release from confinement. She was fined $30,671.44 on Count 13 with a special assessment of $150.00. Charles Lawrence was sentenced to twenty-one months on each count except Count 1, with each sentence to run concurrently. As to Count 1, imposition of sentence was suspended and he was placed on probation for three years to commence upon his release from confinement. He was fined $25,671.44 on Count 8 with a special assessment of $150.00. All of the sentences were within the statutory limits.

Following sentencing, notices of appeal were filed on behalf of each of the petitioners. The district court stayed all aspects of their sentences pending appeal.

Judgment including sentence was entered on March 8, 1990 for all three petitioners. Lawrence filed a timely notice of appeal on March 15, 1990. Joseph and Norah Bertucci filed a timely joint notice of appeal on March 16, 1990. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and Rule 4 (b) of the Federal Rules of Appellate Procedure.

ARGUMENT IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI

THE SEVENTH CIRCUIT'S DECISION ALLOWING A SENTENCING COURT TO CONSIDER AS PART OF THE VICTIM IMPACT STATEMENT THE DOLLAR AMOUNTS RELATING TO COUNTS UPON WHICH PETITIONERS WERE ACQUITTED IS IN CONFLICT WITH THIS COURT'S DECISION IN *HUGHEY V. UNITED STATES*.

Congress has expressly provided that a wide range of information may be considered at sentencing:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3577 (now codified at 18 U.S.C. § 3661). In general, as long as a sentence falls within statutory limits, it will be reversed only for an abuse of discretion. *United States v. Marshall*, 719 F.2d 887, 891 (7th Cir. 1982). Within those parameters, the trial court has broad latitude in determining the appropriate sentence for a particular defendant. *Williams v. New York*, 337 U.S. 241, 247 (1949). The court may consider hearsay, *Marshall*, 719 F.2d at 891; pending charges, *United States v. Haygood*, 502 F.2d 166, 169 (7th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975); deterrence of others, *United States v. Hedman*, 630 F.2d 1184, 1201 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); and defendant's remorse, *United States v. Perez*, 858 F.2d 1272, 1276 (7th Cir. 1988); among a variety of other factors.

In most circuits the facts underlying a defendant's acquitted conduct also may be considered in imposing sentence. *See, e.g., United States v. Isom*, 886 F.2d 736 (4th Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989); *United States v. Ryan*, 866 F.2d 604 (3d Cir. 1989); *United States v. Cardi*, 519 F.2d 309 (7th Cir. 1975); *United States v. Sweig*, 454 F.2d 114 (2d Cir. 1971). *But cf. United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991) ("We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted."). To be considered, however, those facts must be undisputed, or at least not refuted, by the defendant. *Isom*, 886 F.2d at 739 (defendant never disputed fact that he operated printing press; court could therefore consider that conduct even though acquitted); *Juarez-Ortega*, 866 F.2d at 748 (facts underlying acquitted count "not disputed as false or unreliable"); *Cardi*, 519 F.2d at 314 (court emphasized defendant's failure to deny accuracy of F.B.I.

agent's statements regarding acquitted conduct); *Sweig*, 454 F.2d at 182-84 (defendant did not refute facts underlying acquitted conduct; court noted reason and left door open for sentence reduction). The facts underlying the acquitted conduct cannot be used to enhance the sentence. *United States v. Perez*, 858 F.2d at 177-78 (trial court permitted to consider acquitted conduct where it did not enhance the defendant's sentence based on the merits of that conduct). The only apparent exceptions to this rule are situations where a defendant who committed a crime while armed is acquitted of the aggravated offense, but a specific sentence enhancement statute or guideline provision warrants additional punishment. *See United States v. Dawn*, 897 F.2d 1444 (8th Cir. 1990); *United States v. Mocciola*, 891 F.2d 13 (1st Cir. 1989).

The underlying rationale allowing a sentencing court to consider acquitted charges is that an acquittal does not constitute a finding that the defendant did not commit the offense; rather, it establishes only that the government did not prove beyond a reasonable doubt that the defendant committed the offense. *Sweig*, 454 F.2d at 184. When the Seventh Circuit recently addressed the propriety of a sentencing court considering previously acquitted charges in a sentencing guidelines case, *United States v. White*, 888 F.2d 490 (7th Cir. 1988), it noted that *Cardi* allows considering facts underlying acquitted charges. "On the other hand [the court noted], it might make sense to treat an acquittal as a bar in order to avoid both nice questions of proof and the appearance of inconsistency." *Id.*, 888 F.2d at 499.

The inconsistency, of course, lies in the fundamental premises of the jury system. When a person has been tried for an offense and the jury says that person is not

guilty, the verdict ought not be undermined by judge and prosecutor concluding, in essence, that the person actually is guilty of wrongdoing. As noted earlier, courts have rationalized reliance upon conduct forming the basis for acquitted conduct on the premise that the acquittal could have been due to a failure of the government's proof as to a specific element of the offense, or a failure to establish the defendant's guilt beyond a reasonable doubt. *Sweig*, 454 F.2d at 184.

That argument cuts both ways. Although an acquittal may not "conclusively establish the untruth of all the evidence introduced against the defendant," *id.*, neither does it tell us which portions, if any, of the evidence were disbelieved by the jury. If the jury finds certain evidence unbelievable, by what authority can a court nevertheless decide it *is* believable? Unfortunately, because jury deliberations and conclusions are virtually inviolable, the sentencing court has no way of knowing whether the jury believed certain conduct occurred or did not occur. Allowing sentencing judges to consider disputed facts underlying an acquittal relegates the jury's verdict to a mere forum for establishing a defendant's maximum exposure, with the sentencing judge becoming the final arbiter of the facts.

Permitting a sentencing court to consider evidence relating to charges of which defendants were acquitted dilutes the finality of the jury's verdict and diminishes confidence in the criminal justice system. The judge's decision to consider acquitted evidence in this case and include it in the victim impact statement cannot be dismissed as harmless simply because the sentences imposed did not exceed the statutory maximum penalties. The United States Parole Commission's guidelines

for parole release consideration use offender characteristics and offense behavior to establish the parole guidelines range; that is, the range of time the offender must serve before becoming eligible for parole. The presentence report in this case, relying upon the government's version of the offense which included information regarding acquitted counts, noted a parole guidelines range of twelve to eighteen months based upon the government's calculations of unreported taxes for all *charged* counts.

The United States Supreme Court addressed an analogous issue in *Hughey v. United States*, ___ U.S. ___, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990). In *Hughey*, the Court considered whether the Victim and Witness Protection Act of 1982 authorized a court to order a defendant charged with multiple offenses, but convicted of only one offense, to make restitution for losses related to the other offenses. 109 L. Ed. 2d at 413. Hughey, who entered a plea to only one of several counts of theft and use of unauthorized credit cards, was ordered to pay restitution related to all counts. Concluding that the Act limited restitution to convicted counts, the Court reversed and remanded Hughey's sentence.

Later that year the Third Circuit Court of Appeals applied *Hughey* in *United States v. Furst*, 918 F.2d 400 (3d Cir. 1990). Furst was convicted on two counts of embezzlement and six counts of making false statements. On appeal, the Third Circuit reversed three of Furst's convictions and ordered judgments of acquittal on both embezzlement counts and one false statements count. Thereafter, the district court ordered restitution on all counts, including those reversed and ordered acquitted. In his second appeal, Furst challenged on *Hughey* grounds the district court's order requiring him

to pay restitution related to the acquitted counts. The Third Circuit reversed, holding that "the loss caused by the conduct underlying the offense of conviction establishes the outer limits of the restitution order." *Furst*, 918 F.2d at 410 (quoting *Hughey*, 109 L. Ed. 2d at 417).

The same principles apply to the victim impact statements in this case. If the victim impact statement cannot include losses related to acquitted counts for restitution purposes, it cannot include losses related to acquitted counts for other aspects of sentencing such as parole eligibility. The district court's finding that the victim impact was $191,000 was based on the government's claim of the total loss suffered by the Internal Revenue Service as a result of the petitioners' conduct, which included sums related to acquitted conduct. Because the dollar amount in the victim impact statement is used to determine the petitioners' parole eligibility, petitioners' sentences are enhanced in that they must serve a longer period before they become eligible for parole than they would have served had the victim impact been appropriately limited to the losses related to the convicted conduct.

If the amounts involved in the acquitted counts were excluded, the dollar amounts would be significantly reduced. While the reductions may not be significant enough to drop the petitioners into the next lower range of one to ten months, the fact that the figures were toward the lower end of the range would indicate to the Parole Commission that its parole decision should be at the low end of the twelve to eighteen month range. The trial court's inclusion of the alleged unreported income relevant to the acquitted counts thus can have a significant impact upon the amount of time the petitioners will actually spend in prison.

Although challenges to parole eligibility can be addressed through the Parole Commission's administrative procedures, *see United States v. Funt*, 896 F.2d 1288, 1301 (11th Cir. 1990), requiring petitioners to pursue their remedy through administrative channels after they are incarcerated would leave them with no remedy. Once petitioners are released from prison, an appeal to this Court, or even an intermediate court, would be moot. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Because their entire sentences range from eighteen to twenty-four months of imprisonment, petitioners could not possibly exhaust all avenues of appeal from an adverse Parole Commission ruling before they had served their entire sentences. Thus, the issue presented to the Court today is of a nature that "do[es] not last long enough for complete judicial review of the controvers[y]." *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115, 126 (1974). This case therefore falls squarely within the exception to the mootness doctrine in that it is capable of repetition yet evading review. *Murphy*, 455 U.S. at 482.

The *Hughey* Court expressly found, based upon the Victim and Witness Protection Act, that restitution is limited to losses related to convicted conduct. This case does not involve a restitution order, in that the government decided to pursue its claim for unpaid taxes through civil proceedings. Nevertheless, the district court made a finding, as it would have had it ordered restitution, as to the total loss suffered by the victim, the Internal Revenue Service. The district court's inclusion of losses resulting from acquitted conduct in determining the victim impact in this case directly conflicts with *Hughey's* holding that a defendant cannot be held accountable for losses resulting from acquitted conduct.

CONCLUSION

For all the foregoing reasons, the Court is respectfully urged to grant petitioners' request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 90-1614, 90-1630

United States of America,

Plaintiff-Appellee,

v.

Charles W. Lawrence, Jr.,
Joseph A. Bertucci, and
Norah. S. Bertucci,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 89-CR-35—Robert W. Warren, Judge

Argued October 26, 1990—Decided June 10, 1991

Before Bauer, *Chief Judge*, Cummings, and Ripple, *Circuit Judges.*

Bauer, *Chief Judge.* This is an appeal from a criminal tax prosecution of three business partners, Joseph and Norah Bertucci, who are husband and wife, and Charles W. Lawrence, Jr. (collectively, "Defendants"). The three owned and operated two bookstores in Wisconsin: Paradise Books in Milwaukee, and Popular News (LOK, Inc.) in Oshkosh. The bookstores sold "adult oriented" books, magazines, films, and other products.

The stores also operated video arcades featuring sexually explicit films. Whenever a customer purchased merchandise over the counter, the sales clerks carefully noted the type and quantity of the product on a daily sales sheet and rang up the sale on a cash register. Video arcade sales were handled differently. Clerks kept bags of 200 tokens worth fifty dollars at the counter. In order to enter the arcade area, a customer was required to purchase a minimum of two dollars' worth of tokens for use in a private viewing booth. When a clerk sold a bag of tokens, he would take the fifty dollars generated from the sale, band it, and place it in the safe. Video arcade token sales were not rung up on the cash register like merchandise sales, and the daily sales sheet did not contain spaces to keep track of token sales. The video booth coin boxes were emptied once or twice per week. Tokens and coins removed from booth boxes (the boxes accepted both tokens and coins) were identified on bank deposit slips as arcade sales.

The government theorized that Defendants were skimming off a portion of the receipts from the sale of tokens to avoid paying federal taxes on the undisclosed amounts and that they "washed" the skimmed money by concocting phony loans from stockholders and Norah Bertucci's sister, Morel Fry. In January 1986, Steven J. Facik and John R. Schlicht, Special Agents with the Internal Revenue Service ("IRS") Criminal Investigation Division, visited Popular News and informed the Bertuccis that their 1982, 1983, and 1984 personal income tax returns were under investigation. Fifteen minutes into the interview, Lawrence showed up, and the agents questioned all three Defendants together. They were asked about the source of the income generated by their partnership, L & B Enterprises, and also about their

purchases of real estate, stock, a boat, and other items. The agents also asked Defendants if they had deposited all the receipts generated by the token sales into the bookstores' corporate bank accounts, and if these undeposited amounts were reported on their tax returns.

As a result of information garnered during the investigation, the case went to a federal grand jury in Milwaukee. On March 7, 1989, the grand jury returned an indictment against Defendants charging them with conspiracy to impede the IRS in violation of 18 U.S.C. § 371, plus twenty-four other substantive tax charges. After a jury trial, Defendants were found guilty of the conspiracy charge. Additionally, Joseph Bertucci and Lawrence were convicted of filing false corporate income tax returns for Paradise Books and LOK, Inc., in violation of 26 U.S.C. § 7206 (1), and aiding and assisting in the preparation of false corporate tax returns for fiscal years 1982 through 1984, in violation of 26 U.S.C. § 7206 (2). Norah Bertucci was convicted of filing false corporate tax returns for Paradise Books for fiscal years 1982 through 1984 and one count of aiding or assisting in the preparation of a false corporate tax return for LOK, Inc. for 1984. Defendants were acquitted on all charges arising out of their personal and partnership tax returns for 1982 through 1984, and Norah Bertucci also was acquitted on two counts for the corporate returns for LOK, Inc. for the years 1982 and 1983. All three received prison terms, probation, and fines. This appeal followed.

Defendants raise several contentions with regard to the daily sales sheets from Paradise Books and Popular News, compiled during the period between July 31, 1983, to April 7, 1984. On many of the sheets, there appeared two handwritten numbers, one at the top right hand

corner, and one at the bottom right hand corner. The government used these sheets to bolster its skimming theory by hypothesizing that the top number represented the number of bags of tokens available at the beginning of the day, and the bottom number represented the number left at day's end. The difference between these amounts represented the value of the tokens sold during the day. According to the government, because some weekly bank deposits were less than the amounts that should have come in using this method, Defendants must have been skimming off a portion of the token sales for their personal use.

Defendants argue that the trial court abused its discretion by admitting the sheets into evidence without requiring that they be properly authenticated as business records under Federal Rule of Evidence 803 (6). In order for evidence to fall under the business record exception to the hearsay rule, the government must lay a proper foundation establishing that the documents produced were records kept in the course of regularly-conducted activity and that "it was the regular practice of that business to make [the document] as shown by the testimony of the custodian or other qualified witness." Fed. R. Evid. 803 (6). The business records exception to the hearsay rule "does not require that the witness have personal knowledge of the entries in the records. The witness need only have knowledge under which the records were created." *United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984).

In a pretrial motion, the government argued that the bookstores' records (including the daily sales sheets) were authenticated adequately because Defendants admitted to the investigating agents that the bookstores

made and kept the records in connection with their corporations, and because Defendants' attorney produced the records in response to the government's summonses and subpoenas. The district court rejected Defendants' contention that the documents can be authenticated only by a witness who is an employee or agent of the organization familiar with the organization's practices and procedures. Pronouncing our decision in *United States v. Brown*, 688 F.2d 1112 (7th Cir. 1982) (Bauer, J.), "controlling," the court held that "once a defendant voluntarily produces documents and implicitly represents them to be the corporate records, he cannot be heard to contend that they are not so." *United States v. Bertucci*, No. 89-CR-35, slip op. at 9 (E.D. Wis. Sept. 25, 1989).

In *Brown*, the defendant had been subpoenaed to appear before a grand jury with company records pertinent to his indictment for embezzlement of federal funds. The defendant negotiated an agreement whereby his attorney would produce the documents without the defendant having to appear. At a pretrial hearing, the defendant refused to authenticate the records and was held in contempt of court. The records then were identified by an Assistant United States Attorney and an FBI Special Agent. Both testified that the defendant's attorney delivered the records to them, representing that he was the defendant's agent, and that the records he was delivering were the records that had been subpoenaed. The court admitted the records on the basis of this testimony. On appeal, the defendant maintained that identification by the government witnesses was not proper authentication. We held that once the defendant voluntarily produced the records and implicitly represented them to be the company records, he could not later

complain that the documents did not originate from the company. Further, Federal Rule of Evidence 901 provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." The defendant was an officer of the company, and produced the documents voluntarily. He thus was in a position to vouch for their authenticity, and his "very act of production was implicit authentication." *Brown*, 688 F.2d at 1115-16.

With *Brown's* principles in mind, we conclude that the trial court did not abuse its discretion in admitting the daily sales sheets as properly authenticated business records. The subpoenaed documents were delivered by Defendants' attorney and they were identified by the government witnesses. Other factors lend reliability to the documents as well. Defendants admitted to Special Agent Facik during the investigation that they kept various records, including daily sales sheets, as part of their method of operation. In addition, the collective testimony of several of Defendants' employees—testimony of custodians or otherwise qualified witnesses who can explain the record- keeping of the organization—established the regular practices and procedures under which the records were created, the very elements necessary for a finding of trustworthiness. Michael Traudt, Robert Frank, Steven Bong, and Thomas Martin, clerks from Defendants' stores, and Raymond Manis, a manager of Popular News, testified that numbers were placed at the top and bottom right hand corners of the daily sales sheets, indicating the number of bags of tokens that were available at the beginning and end of each day. Manis instituted a system to give Joseph Bertucci a daily count of sales. He testified that he used the daily sales sheets to

prepare a deposit ticket for the receipts from the weekly token sales. He also provided the daily sales sheets and deposit tickets to either Joseph Bertucci or Lawrence. Frank testified that he discussed the daily sales sheets with Joseph Bertucci and that he gave them to Bertucci at the end of his shift. Bong related that Joseph Bertucci told him to place the notations on the daily sales sheets, and Martin indicated that he saw all three Defendants emptying the safe where the receipts from token sales were kept and comparing the receipts in the safe against the notation on the upper right hand corner of the daily sales sheets.

This testimony, together with Defendants' own statements to government investigators that they kept these records in connection with their businesses and the production of those records by their attorney in response to a government subpoena, leads us to conclude that the trial court properly admitted the daily sales sheets into evidence as properly authenticated business records. Defendants contend that the "sources of information and the documents themselves indicate such a complete absence of trustworthiness that any apparent authentication under Rule 803 (6) is invalid." Defendant's Brief at 28-29. Defendants point out that none of the clerks really knew if there was a standard procedure for recording token sales or how it worked. Defendants also suggest that the daily sales sheets themselves were untrustworthy because many bore missing or incomplete numbers in the top and bottom corners. The evidence is to the contrary. Several of Defendants' employees testified in some detail concerning the practice of making notations on the right hand corners of the daily sales sheets indicating token sales. Moreover, Special Agent Facik analyzed 783 daily sales sheets, and only 33 failed

to contain these notations on the top and bottom right hand corners.

Next, we turn to the Bertuccis' argument that the trial court abused its discretion by granting the government's request for an "immunity instruction" for Morel Fry, a government witness and the younger sister of Norah Bertucci. Fry's testimony was relevant to the government's "net worth analysis" of Defendants' finances. If the taxpayer's net worth at the end of a period exceeds that at the beginning of the period, and the increase cannot be attributed to reported income, an inference may be drawn that there is unreported taxable income. See *United States v. Marrinson*, 832 F.2d 1465, 1469 (7th Cir. 1987). Part of the government's case was that one of the ways that the Bertuccis concealed the true source of their income was by creating false loans from Fry. The Bertuccis reaped another benefit from the arrangement as well. Because the initial loan required repayments at 19% interest and the subsequent loan required interest payments at 17% and 15%, the Bertuccis could take a tax deduction for the interest paid on these loans.

Fry's testimony, therefore, was important to the government's case, but she refused to testify on the grounds that her answers might tend to incriminate her. Consequently, Fry testified on behalf of the government before the grand jury and during the trial under a grant of immunity. She told the jury that, in July 1982, Joseph Bertucci asked her to lend him money. Despite the fact that Fry worked as a librarian or a library administrator averaging $18,818 per year, she "loaned" her brother-in-law $53,400. When challenged as to her ability to come up with this amount, Fry indicated that she had saved $25,000 from her salary and that she

obtained the remainder from her mother. She was questioned closely about this considerable financial "cushion" in light of her salary, bank transactions, and funds she had borrowed from her step-father to purchase a car that remained unpaid.

Fry basically was a hostile witness. The government requested and received the standard Seventh Circuit jury instruction regarding immunized witnesses:

> You have heard testimony ... from Morel Fry who received immunity. That is a promise from the government that any testimony or other information [she] provided would not be used against [her] in a case. You may give [her] testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

See Federal Criminal Jury Instructions of the Seventh Circuit § 3.19 (1980). At trial, and in this appeal, the Bertuccis argued that the immunity instruction is a "defense instruction" that should not have been given because it improperly bolstered the government's case. They argue that it is unfair for the government to grant a witness immunity and then ask for an instruction that the testimony should be considered suspect because it was given under a grant of immunity. Defendants failed to object to the same immunity instruction given with regard to the testimony of Michael Kostal, a bookstore employee who also testified on behalf of the government under a grant of immunity. Kostal's testimony was that there was a pattern of skimming at LOK, Inc. We thus understand Defendants' argument to be that the government somehow undermined their case by attacking the

credibility of the witness who gave evidence in their favor.

It is true that the immunity instruction ordinarily is a "defense instruction." After all, only the government can grant immunity to gain testimony from a recalcitrant witness. *See* 18 U.S.C. § § 6002, 6003. Here, however, Defendants had no reason to ask for the instruction because they benefited from Fry's immunized testimony, in that it corroborated their claim that she loaned Joseph Bertucci a sizable sum of money in currency at about the time he and Lawrence went into the adult bookstore business. Instead, it was the government who asked the jury to consider its own witness's testimony with a greater degree of caution than that of other witnesses. Although it is somewhat unusual for the government to ask for such an instruction, we do not find the practice troubling. An immunized witness may have a strong motive to falsify. Rule 607 of the Federal Rules of Evidence provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." Furthermore, the government's request of the immunity instruction did not serve to deprive Defendants of exculpatory evidence necessary to present an effective defense. Even if the immunity instruction had not been given, it is not unfathomable that the jury would have disbelieved that an $18,000-a-year librarian would have loaned her brother-in-law $53,400 to open an adult bookstore, and the immunity instruction did not improperly suggest to the jury that it do so.

Jury instructions must be reviewed in their entirety and be taken as a whole, *United States v. Ruiz*, No. 90-1787, slip op. at 8-9 (7th Cir. May 17, 1991), and we will not interfere if the instructions treated the issues fairly

and adequately. *United States v. Durades*, 929 F.2d 1160, 1167 (7th Cir. 1991). Immunized witnesses receive a benefit for their testimony, and their testimony may be colored. Even if, as here, the testimony of an immunized witness unexpectedly runs in favor of the defense, a trial court does not abuse its discretion by advising the jury to view it with "caution and great care." The jury's function of assessing credibility and weighing testimony is aided by such an instruction, regardless of who requests it.

Defendants' final challenge is to their sentences. They contend that the trial court abused its discretion by considering for purposes of sentencing conduct for which Defendants had been acquitted at trial. Out of a total of twenty-five counts in the original indictment, Defendants were acquitted on fourteen counts, including all charges relating to filing, or aiding or assisting in the preparation of, false tax returns for L & B Enterprises, and filing false joint individual income tax returns. Norah Bertucci was acquitted on two counts involving corporate returns. Prior to sentencing, Defendants objected to the inclusion of information in their presentence reports regarding the offenses of which they had been acquitted. Defendants unsuccessfully argued—as they do in this appeal—that because the facts supporting the acquitted charges were in dispute, the district court's consideration of these facts under a standard of proof less than beyond a reasonable doubt vitiated the jury's verdict.

On appeal, the district court disagreed, stating that it had broad discretion to consider for purposes of sentencing all the evidence presented at trial. *United States v. Bertucci*, 730 F. Supp. 1483, 1488 (E.D. Wis. 1990). It based its conclusion upon the express language of section

3661 of Title 18 of the United States Code, which states "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Section 3661, as well as its predecessor, § 3577 (originally enacted as 18 U.S.C. 3577 (1984)), are applicable to offenses committed prior to November 1, 1987. The court also relied upon several of our opinions, including *United States v. White*, 888 F.2d 490 (7th Cir. 1990); *United States v. Marshall*, 719 F.2d 887, 891 (7th Cir. 1983) ("there is little limit on the type of information the district court can consider in sentencing"); *United States v. Ray*, 683 F.2d 1116, 1120 (7th Cir.) (only limit on type of information is "due process limitations on the degree to which the judge may rely on convictions obtained without the benefit of counsel, or convictions based on materially false or unreliable information"), *cert. denied*, 459 U.S. 1091 (1982); and *United States v. Cardi*, 519 F.2d 309, 311 (7th Cir. 1975) (sentencing judge has "wide discretion"). The district court noted that before imposing sentence, it had viewed the trial evidence in its entirety. Denying Defendants' assertion that the sentencing procedure was a "one-man retrial," *Bertucci*, 730 F. Supp. at 1488, the court indicated that it merely considered the same evidence presented at trial, but under the less stringent evidentiary standard.

Against all this, Defendants point to language in *White* that suggests that a judge ought not to undermine a jury's verdict of "not guilty" by considering facts underlying an acquittal for purposes of sentencing: "[I]t might make sense to treat an acquittal as a bar in order to avoid

both nice questions of proof and the appearance of inconsistency." 888 F.2d at 499. *White* was a Sentencing Guidelines case and involved a completely different issue: may drugs that were not part of the offense of which the defendant was convicted but that were part of the same course of conduct as the offense of conviction be used to compute the sentence? The answer to that question was "yes," and we decline the invitation to extend *White's* dicta to the facts of this pre-Guidelines case. We note that before the enactment of the Guidelines, "judges routinely took related bad acts into account when imposing sentence." *Id.* at 496. For example, in *Cardi*, we stated that an "acquittal does not preclude the district court from considering the information concerning [the defendant's] association with these activities" for purposes of sentencing. 519 F.2d at 314 n.3. Indeed, a sentencing court may consider uncorroborated hearsay that the defendant has had an opportunity to rebut, illegally obtained evidence, and evidence for which the defendant has not been prosecuted. *United States v. Plisek*, 657 F.2d 920, 926-27 (7th Cir. 1981). *See generally* Burke, *Limitations, Under Federal Constitution's Guaranty of Due Process of Law, as to Consideration of Personal Information about Accused in Imposition of Initial Sentence for Criminal Offense—Federal Cases*, 63 L. Ed.2d 872 (1980).

The information the district court considered in this case was tested and found reliable by "the crucible of cross-examination." *Id.* The information was relevant, and the court reasonably believed that it was reliable and accurate. Thus, the consideration of the information for sentencing purposes was proper, and the resulting sentence was not a denial of due process, particularly

when the sentences imposed did not exceed the statutory maximum penalties.

For all the foregoing reasons, the Defendants' convictions and sentences are, in all respects, AFFIRMED.

RIPPLE, *Circuit Judge,* concurring. I join the principal opinion and the judgment of the court. The question of whether a sentencing judge may consider the underlying facts of a charge which resulted in an acquittal of the defendant is a difficult and troublesome one. Although the case law is hardly a seamless garment, it does appear, as the principal opinion suggests, that this circuit has joined the majority of other circuits in holding that the sentencing judge may consider such information. As the principal opinion notes, we expressed approval of the majority position in *United States v. Cardi,* 519 F.2d 309, 314 n. 3 (7th Cir. 1975). Among our more recent reiterations of this principle, the language in *United States v. Fonner,* 920 F.2d 1330, 1332 (7th Cir. 1990), is perhaps the most succinct:

> Nothing in either the guidelines or the Constitution prevents a judge from taking account of conduct in which the defendant engaged, whether or not an acquittal prevents the imposition of criminal penalties directly on that conduct. A verdict of "not guilty" does not mean that the defendant didn't do it; it means that the prosecution failed to establish culpability beyond a reasonable doubt.

On the other hand, in *United States v. Perez,* 858 F.2d 1272, 1277 (7th Cir. 1988), this court appeared to limit the general rule when it wrote that "this court has upheld

the trial court's consideration of a prior acquittal as long as the acquittal is not relied upon to enhance the sentence." Furthermore, as the principal opinion points out, in *United States v. White,* 888 F.2d 490, 499 (7th Cir. 1989), a panel of this court suggested in dicta that "it might make sense to treat an acquittal as a bar in order to avoid both nice questions of proof and appearance of inconsistency." Moreover, recently, in *United States v. Brady,* 928 F.2d 844, 851 (9th Cir. 1991), a panel of the Ninth Circuit has held that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted."

While the holding of the Ninth Circuit and the dicta in some of the opinions in this circuit raise serious doubts, and might even carry the day if this were a matter of initial impression and a matter purely within the cognizance of the judiciary, I believe that Chief Judge Wallace was correct in his partial dissent in *Brady* when he noted that the statutory mandate of 18 U.S.C. § 3661 as well as the doctrines of stare decisis and precedent require affirmance here. *See* 928 F.2d at 854-57 (Wallace, C.J., concurring in part and dissenting in part). The Supreme Court has already granted certiorari in several cases raising analogous questions. *See, e.g., United States v. Williams,* 910 F.2d 1574 (7th Cir. 1990), *cert. granted,* 111 S. Ct. 1305 (1991); *United States v. Braxton,* 903 F.2d 292 (4th Cir.), *cert. granted,* 111 S. Ct. 426 (1990). If *Brady* is the preferable view, the Supreme Court shall tell us in due course. In the meanwhile, we ought to follow, as the principal opinion does, the plain wording of the statute and the weight of authority.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOSEPH A. BERTUCCI,
NORAH S. BERTUCCI, and
CHARLES W. LAWRENCE, JR.,
Defendants.

No. 89–CR–35,

UNITED STATES DISTRICT COURT,
E.D. WISCONSIN

FEBRUARY 9, 1990

DECISION AND ORDER

WARREN, Chief Judge.

Before the Court is the defendants' motion for judgment of acquittal pursuant to Fed.R.Crim.P 29 (c), and an issue of law raised at a Fed.R.Crim.P. 32 hearing.

I. BACKGROUND

On March 7, 1989, a federal grand jury returned an indictment against defendants Joseph A. and Norah S. Bertucci and Charles Lawrence, Jr. The indictment contained 25 counts, alleging that the defendants conspired to impede the Internal Revenue Service in violation of 18 U.S.C. § 371, and charging that the defendants filed false individual, joint, corporate, and partnership tax returns for the years 1982 through 1984 in violation of 26 U.S.C. § 7206. A jury trial commenced in this Court on September 25, 1989. On October 19, 1989, the jury returned a verdict, finding Joseph Bertucci guilty on Counts 1, 9, 10, 12, 15, 17, and 19; Norah Bertucci guilty on Counts 1, 13, 14, 16, and 18; and Charles Lawrence guilty on Counts 1, 8, 11, 13, 15, 17, and 19. *See* Government's Memorandum in Response to Defendants' Post-Verdict Motion pp. 2-3. The jury acquitted the defendants on the remaining counts.

The defendants have moved this Court for a judgment of acquittal pursuant to Fed.R.Crim.P. 29 (c), which provides:

> (c) **Motion After Discharge of Jury.**
>
> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within

> such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

[1] The law on such a motion is clear. Inconsistency in a jury's verdict is not a valid ground for granting a defendant's motion for judgment of acquittal. *U.S. v. Reed,* 875 F.2d 107, 110-11 (7th Cir. 1989); *U.S. v. Abayomi,* 820 F.2d 902, 907 (7th Cir. 1987). In reviewing a ruling on a motion for judgment of acquittal based on a challenge to the sufficiency of the evidence:

> "[T]he test that the court must use is whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendants] guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government ... bear[ing] in mind that 'it is the exclusive function of the jury to determine the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences."

U.S. v. Marquardt, 786 F.2d 771, 780 (7th Cir. 1986) (citations omitted) (cited in *U.S. v. Reed,* 875 F.2d at 111). " 'This review should be independent of the jury's determination that evidence on another count was insufficient.' " *U.S. v. Torres,* 809 F.2d 429, 432 (7th Cir. 1987) (quoting *U.S. v. Powell,* 469 U.S. 57, 65, 105 S.Ct. 471, 478, 83 L.Ed.2d 461, 470 (1984)).

II. DISCUSSION

[2] This Court states preliminarily that although the defendants have not brought their motion within the seven days Rule 29 requires, the government does not object to the date the defendants filed the motion, and this Court finds no reason why it should not be considered.

The defendants conclude that their acquittal on the individual and partnership return counts so eroded the factual basis for their conviction on the corporate return and conspiracy counts that the guilty verdicts cannot stand. Thus, the essence of the defendants' motion is not that the inconsistency in the jury's verdict provides for a judgment of acquittal, which *Reed* clearly precludes, but that the government's evidence at trial did not support the jury's guilty verdict on the above-delineated counts. The government has responded by relating the evidence it adduced at trial. This Court's task is to determine whether the government produced relevant evidence at the trial from which the jury could reasonably find the defendants guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government, remembering that it is the exclusive function of the jury to determine the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences.

The defendants assert that the jury rejected the net worth case against them, and that the specific items of evidence the government presented were insufficient on which to base a guilty verdict. The defendants point to what they consider to be the chief weakness in the government's "specific items" case: The defendants introduced into evidence another set of the daily sales

sheets from a different six-month period which showed that the defendants had overreported their income based on the government's same theory. The defendants conclude that no rational jury could have based a guilty verdict upon it for a single year, much less three years.

The government responds by summarizing the evidence it produced. *See* Government's Memorandum pp. 8-10 ("B. Bookstore Operations"); pp. 10-12 ("C. Daily Sales Sheets"); and pp. 12-13 ("D. Concealment of Funds"). Viewing the evidence in a light most favorable to the government, as this Court must in a Rule 29 motion at this stage, these recitations comport with this Court's recollection of the evidence. Specifically, it is within reason for the jury to have found the defendants guilty of underreporting corporate income, as the evidence adduced at trial viewed in the government's favor could support the conclusions that: (1) the operation of the bookstores resulted in the defendants depositing only a portion of the receipts generated by the token sales in the bookstores' corporate bank accounts; and (2) the daily sales sheets reflected that the defendants deposited only a portion of the receipts generated by the token sales in the bookstores' corporate bank accounts. Moreover, it is within reason for the jury to have found the defendants guilty on the conspiracy count, as the evidence adduced at trial viewed in the government's favor could support the conclusions that: (1) the defendants diverted substantial receipts from the bookstores for their personal use, concealing and disguising these funds (see Government's Memorandum pp. 12-13); and (2) it follows from the net worth method that the likely source of the defendants' unreported income was funds generated from the film booths at the two bookstores (see Government's

Memorandum pp. 15-18 [as to Paradise One, Inc. and LOK, Inc.]). Although the defendants point out that the jury must have rejected the net worth method as proof to support the allegations in the counts regarding individual and partnership returns, it does not follow from the jury's rejection of that method of proof on those counts that the jury also rejected the method for the counts on which they returned guilty verdicts. Finally, it is within reason for the jury to have found the defendants guilty on the corporate return and conspiracy counts, as the evidence at trial viewed in the government's favor could support the conclusion that: (1) the Morel Fry loan of $53,400.00 was a sham (see Government's Memorandum pp. 20-26); and (2) the defendants did not have cash accumulations as they testified at trial prior to January 1, 1982, and thus that the likely source of the defendants' unreported income was funds generated from the film booths at the two bookstores (see Government's Memorandum pp. 27-29).

The defendants also argue that the weakness in the government's "specific items" case (that the defendants introduced into evidence another set of the daily sales sheets from a different six-month period which showed that the defendants had overreported their income based on the government's same theory) means that no rational jury could have based a guilty verdict upon it for a single year, much less three years. But this Court in ruling on the defendants' motion must "bear in mind that 'it is the exclusive function of the jury to determine the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences.'" *Marquardt*, 786 F.2d at 780. It is within the jury's province to reasonably infer from the evidence presented that the underreporting of corporate income derived from token sales

existed in all three years for both corporations at issue. *See* Government's Memorandum pp. 15-18. Although the government only presented daily sales sheets for a certain period that did not cover all three years, and the defendants presented conflicting evidence, it is the jury's determination that controls on the possible underreporting for both corporations in all three years, based not only on the daily sales sheets, but the oral testimony and all other evidence at the trial (see above six conclusions). This Court is not to invade the jury's province on a Rule 29 motion unless no evidence supports their conclusions and the inferences the jury must have reached to conclude guilt were unreasonable. The defendants have not demonstrated such a complete lack of evidence or the unreasonableness of the possible conclusions.

III. RULE 32 EVIDENCE

[3] At a Rule 32 hearing held in this action on Friday, January 26, 1990 at 10:00 a.m., the defendants presented a question of law which they assert controls the sentencing procedure that remains to be completed in this case. The issue is the propriety of the Court considering evidence submitted in support of those counts on which the jury acquitted the defendants.

The defendants assert such evidence should not be considered. The rationale allowing a sentencing court to consider acquitted charges goes as follows: An acquittal is not a finding that the offense was not committed, but rather a finding that the government did not prove the offense by proof beyond a reasonable doubt. Under this rationale, the sentencing court must reconsider all evidence under the preponderance of the evidence standard to determine whether the defendants actually committed the acts of which they were acquitted. Because the

facts supporting the acquitted charges in this case are disputed, the defendants assert that an inconsistency in the level of proof necessary for punishing a person for a criminal offense, as well as an administrative nightmare, will result. The defendants advance that allowing consideration of the disputed facts underlying an acquittal will vitiate the jury verdict. Further, the alternative will be for this Court to hold a separate evidentiary hearing at each sentencing, "in effect a sentencing trial," at which each party would present evidence calculated to meet the less stringent burden of proof. The defendants point out that this would be a logistical disaster, as it would require the presence of all witnesses, the retaking of testimony, and perhaps the taking of additional testimony.

The government concludes that under 18 U.S.C. § 3577, this Court has wide discretion in considering information at sentencing. *See U.S. v. Marshall,* 719 F.2d 887, 891 (7th Cir. 1983) (Seventh Circuit held "that the sentencing judge properly could rely upon [evidence regarding threats made by a defendant against others] if it is first determined that the information was reliable and allowed the defendant an opportunity to rebut the information." *U.S. v. Nowicki,* 870 F.2d 405, 407 (7th Cir. 1989)). The rationale for considering this evidence is that as long as the information that "the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence." *U.S. v. Marshall,* 519 F. Supp. 751, 754 (E.D. Wis. 1981) (citations omitted). Considering the Seventh Circuit's latest pronouncement in *U.S. v. White,* 888 F.2d 490 (7th Cir. 1989), as well as its ruling in *U.S. v. Cardi,* 519 F.2d 309, 314 n. 3 (7th Cir. 1975), the

government avers that based upon § 3577, this Court can consider all evidence that was elcited during the trial which it deems reliable.

Section 3577 of Title 18 has been transferred within the United States Code. It now resides at § 3661. That section provides:

> **Use of information for sentencing**
>
> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

The courts that have interpreted § 3661 and its predecessor § 3577 have given trial courts broad discretion in considering information at sentencing. In *U.S. v. White,* 888 F.2d 490 (7th Cir. 1989), the Seventh Circuit's latest pronouncement on this issue, the court did postulate that "it might make sense to treat an acquittal as a bar to avoid nice questions of proof and the appearance of inconsistency." *Id.* at 499. More to the point, however, the court stated:

> Several courts of appeals, including ours, have allowed district judges to augment sentences after concluding that the defendants really did things of which they had been acquitted. *United States v. Cardi,* 519 F.2d 309, 314 n. (7th Cir. 1975); *see also United States v. Bernard,* 757 F.2d 1439, 1444 (4th Cir. 1985) (collecting cases); *cf. United States v. Dowling,* 855 F.2d 114 (3d Cir. 1989) (prosecution may use as substantive evidence under Fed.R.Evid. 404 offense of which the defendant has been acquitted), *cert. granted,* ___ U.S. ___, 109 S.Ct. 1309, 103 L.Ed.2d 579 (1989).

Id.

An examination of the other relevant Seventh Circuit case law on this issue yields the conclusion that evidence pertaining to the counts on which the jury acquitted the defendants may be received and considered by the Court under the preponderance of the evidence standard. The Seventh Circuit held in *Cardi* that a sentencing court did not err in considering information regarding a defendant's association with certain criminal activities of which he had been acquitted. 519 F.2d at 314, n. 3. A case on which the court relied in *Cardi, U.S. v. Sweig,* 454 F.2d 181, 184 (2d Cir. 1972), delineated the rationale behind permitting a sentencing judge to consider information relating to a crime for which a defendant had been acquitted:

> In fact the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal observation of the witness.

In interpreting § 3577, the Seventh Circuit stated in *U.S. v Ray,* 683 F.2d 1116, 1120 (7th Cir. 1982):

> A sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' *United States v. Tucker,* 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). Information which may be permissibly considered includes criminal activities for which the defendant has not been prosecuted, illegally obtained evidence, criminal charges of which the defendant has been acquitted, and uncorroborated

hearsay evidence which the defendant has had an opportunity to rebut. *United States v. Plisek*, 657 F.2d 920, 926-27 (7th Cir. 1981). There are, however, due process limitations on the degree to which the judge may rely on convictions obtained without the benefit of counsel, or convictions based on materially false or unreliable information. *Id.* at 924.

This survey of the case law illustrates that although the defendants have pointed to a statement in the *White* case on which the Seventh Circuit may some day formulate the holding that the defendants seek, namely that evidence cannot be relied upon regarding criminal charges of which the defendant has been acquitted, that court has not yet done so. Further, this Court is not convinced that it should so broadly interpret the law. After considering: (1) the plain meaning of § 3661; (2) the Seventh Circuit's statements in *White, Cardi, Ray,* and *Marshall* which allow a sentencing judge to consider criminal charges of which the defendants have been acquitted; indeed, the sentencing judge is allowed to consider evidence far less reliable than that at issue in the case, including hearsay, illegally obtained evidence, and criminal activities for which the defendants have not been prosecuted; (3) the fact that the evidence on the acquitted accounts has been tested for reliability, and the defendants had the opportunity to rebut that evidence, see *Sweig,* 454 F.2d at 184; and (4) the inapplicability of the exception for the due process limitations on the degree to which the judge may rely on convictions obtained without the benefit of counsel, or convictions based on materially false or unreliable information; this Court is satisfied that in sentencing the defendants, it may consider evidence adduced at trial regarding counts on which the jury acquitted the defendants. The Court is to consider this evidence under the preponderance of the evidence standard.

The defendants state that allowing the sentencing judge to reconsider all the evidence—including that proffered for acquitted counts—under the preponderance of the evidence standard would result in an inconsistency in the level of proof necessary to punish a person for a criminal offense, as well as an administrative nightmare. The defendants relate that the sentencing judge would be placed on the horns of a dilemma: either he could determine the implications of the jury's verdict of acquittal without rehearing, which would require an impermissible invasion of the jury's function, or the court would have to hold a separate evidentiary hearing at each sentencing at which each party would present evidence calculated to meet the less stringent burden of proof, resulting in huge logistical problems.

The dilemma is illusory, however. An evaluation of the first horn demonstrates that the sentencing judge, by considering evidence as to counts on which the jury acquitted the defendants, is not holding a separate one-man retrial; he is only considering all evidence that has been presented during the trial against the reduced evidentiary level or preponderance of the evidence. *See Sweig,* 454 F.2d at 184. The Seventh Circuit law is settled that if the sentencing judge finds that the government has borne the burden of demonstrating guilt by a preponderance of the evidence, the evidence of those crimes can be taken into account as part of the totality of the factors that inform the judge's decision as to the proper sentence. The number of counts on which the defendants have been convicted does not increase. This conclusion is supported by a solid rationale: if the information that the sentencing judge considers has been tested and found reliable to support probable accuracy (by, for example, cross-examination), the information

may properly be taken into account in sentencing. *See Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981). The defendants had such an opportunity to challenge all of the government's evidence at trial. The reliable evidence that is the dross of the crucible of cross-examination should not be ignored, but considered at sentencing. It should be remembered that all evidence the defendants have proffered on the acquitted counts is considered as well.

The second horn of the alleged dilemma, when examined, also fails to confound. The evidence at trial need not be presented again considering the new, lower evidentiary standard. This Court has taken copious notes regarding the presentation of evidence, and in sentencing the defendants can weigh the testimonial and other demonstrative evidence in light of the new evidentiary norm without having it presented again. A "sentencing trial" is not necessary, as the evidence need not be recalculated to meet a less stringent burden of proof. Although it is evaluating the level of the evidence against a lesser burden than was assumed at trial, the Court is considering evidence that has already been cross-examined. Nothing is lost in terms of a full determination of credibility or reliability, as this Court does not opine that defense counsel would or could be more stringent in their interrogation just because the evidence is evaluated against a less stringent standard.

The evidence offered to prove the failure to report partnership and individual income can be included in the presentence report and considered by the Court in sentencing the defendants on the corporate and conspiracy counts. Although the defendants can rely on the statement in *White* that "nice questions of proof and

the appearance of inconsistency" can be avoided by not including and considering such evidence, the Seventh Circuit case law provides for its consideration. Notwithstanding the defendants' policy arguments of relegating the jury verdict to a forum for establishing a defendant's maximum exposure and impermissible invasions of the jury's function, this Court determines that it should consider all evidence as it has been presented at trial, including that on the acquitted counts, in its sentencing determination.

IV. SUMMARY

For the reasons mentioned above in part II, the defendants' motion for a judgment of acquittal under Fed.R.Crim.P. 29 (c) is DENIED. Also, the defendants' objection to this Court considering evidence at trial regarding counts on which the jury acquitted the defendants is OVERRULED. A rehearing on the evidence is deemed unnecessary. The defendants may of course make a standard presentation under Rule 32 at or before the time of sentencing.

SO ORDERED.

Supreme Court, U.S.
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OCT 7 1991
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(2)

No. 91-233

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES W. LAWRENCE, JR., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court may consider at sentencing conduct for which a defendant has been acquitted.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 18-32, is reported at 934 F.2d 868. The opinion of the district court, Pet. App. 33-46, is reported at 730 F. Supp. 1483.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1991. The petition for a writ of certiorari was filed on August 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioners Charles W. Lawrence, Jr., Joseph A. Bertucci, and Norah S. Bertucci were convicted on one count of conspiracy to defraud the United States by impeding the functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371. Petitioners were also convicted of filing false corporate income tax returns, in violation of 26 U.S.C. 7206(1), and aiding and assisting in the preparation of false corporate returns, in violation of 26 U.S.C. 7206(2). Petitioners were acquitted on 14 counts relating to false partnership tax returns and false personal income tax returns, and petitioner Norah Bertucci was also acquitted on two counts involving false corporate returns. Pet. App. 20, 28.

The district court sentenced petitioner Charles Lawrence to 21 months in prison, three years of probation, and a fine of $25,671.44. Petitioner Joseph Bertucci was sentenced to two years' imprisonment, three years of probation, and a $40,671.44 fine. Petitioner Norah Bertucci was sentenced to 18 months in prison, three years of probation, and a fine of $30,671.44. Gov't C.A. Br. 5. The court of appeals affirmed.

1. In the early 1980's, petitioners owned and operated two adult bookstores in Wisconsin. In addition to selling merchandise, the stores operated video arcades featuring sexually explicit films. The stores had different methods for handling sales of merchandise over the counter and sales at the video arcade. Customers wishing to enter the video arcade were required to purchase tokens for use in a private viewing booth. Clerks kept bags of tokens at the

counter. The token sales were not rung up on the cash register and were not routinely entered on daily sales sheets. Petitioners deposited only a portion of the token sales receipts into the bookstores' corporate bank accounts, and for income tax purposes they informed their accountant of only the amounts deposited into those accounts. Pet. App. 18-19; Tr. 604, 607-608, 1526-1532, 1592-1595.

During the period July 31, 1983, through June 4, 1984, one of the bookstores received $35,388 in token income, which petitioners did not report on the corporate income tax returns. Tr. 1429-1434, 1528-1532. During the period from August 23, 1983, to December 30, 1984, the other bookstore received $16,615 in token income, which petitioners also did not report on the corporate income tax returns. Tr. 1430-1434, 1592-1594. For fiscal years 1982 through 1984, petitioners caused the first bookstore to underreport its total income by almost $200,000, and in those same years, the bookstore reported only $1,227.31 in income tax owed, when its actual income tax liability totaled $75,952.23. Tr. 1808-1810. Petitioners caused the second bookstore to underreport its income for fiscal years 1982 through 1984 by almost $70,000, and the second store reported that no tax was owed for 1982 and 1983, when in fact it owed $8,762.36 for those years. Tr. 1811-1812.

The evidence showed that petitioners used various methods to conceal the unreported receipts of the bookstores. They dealt largely in cash. In addition, they deposited large amounts of cash generated by the bookstores into corporate bank accounts, but they caused those deposits to be recorded on the corporate books as loans from shareholders rather than as income. Tr. 1537-1539, 1571-1579, 1644-1647.

Petitioners were also involved in a real estate and investment holding entity. Tr. 1513-1514. The indictment charged that petitioners were responsible for filing false tax returns for that entity, but petitioners were acquitted on all counts relating to those returns. Pet. App. 28.

2. Prior to sentencing, petitioners objected to the inclusion of information in their presentence investigation reports relating to the conduct as to which they had been acquitted. They argued that the district court could not consider the evidence that related to the counts on which they had been acquitted, because to do so would contravene the jury's verdict. Pet. App. 28, 40. The trial judge determined, however, that because the government had proved that conduct by a preponderance of the evidence, he could consider the evidence for purposes of sentencing. *Id.* at 43-44.

3. The court of appeals affirmed. The court rejected petitioners' argument that the district court had abused its discretion by considering, for purposes of sentencing, conduct for which they had been acquitted at trial. Pet. App. 28-31.

ARGUMENT

Petitioners maintain that the sentencing judge should not have considered conduct for which they had been acquitted at trial.

1. Before the Sentencing Guidelines became law, it was well settled that a district judge had broad discretion in imposing sentence within the statutory limits. *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972). Generally, a sentence within the statutory limits would not be disturbed unless it was "founded at least in part on misinformation of con-

stitutional magnitude." *Id.* at 447. This Court made clear that the sentencing judge could "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.* at 446.[1] Moreover, Congress has long provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661 (formerly 18 U.S.C. 3577 (1982)).

Applying those principles, the courts uniformly concluded before the Sentencing Guidelines went into effect that a sentencing court could consider evidence regarding a crime for which the defendant was never charged, tried, or convicted. *E.g.*, *United States* v. *Grayson*, 438 U.S. 41 (1978) (trial court may consider the defendant's perjury while testifying at trial); *Williams* v. *New York*, 337 U.S. 241, 244 (1949) (sentencing court considered defendant's prior criminal record, including 30 burglaries for which he had not been convicted, without allowing him to cross-examine witnesses on the subject). It was likewise well settled that the sentencing court could consider evidence regarding a crime for which the charges had been dismissed, *e.g.*, *United States*

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[1] A defendant's right to due process did (and still does) place limits on the degree to which a judge may rely on convictions obtained without the benefit of counsel or convictions based on materially false or unreliable information. See *United States* v. *Tucker*, *supra* (error to consider unconstitutionally obtained prior felony conviction); *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948) (error to consider misinformation when uncounseled defendant had no opportunity to prevent court from being misled).

v. *Ortiz*, 742 F.2d 712, 714 n.3 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *United States* v. *Hansen*, 701 F.2d 1078, 1081 (2d Cir. 1983); *United States* v. *Needles*, 472 F.2d 652, 654-656 (2d Cir. 1973); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965); evidence regarding a crime for which the defendant's conviction was later reversed on appeal, *e.g.*, *United States* v. *Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973); or evidence regarding a crime for which the defendant had been acquitted at trial, *e.g.*, *United States* v. *Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990) ("an acquittal does not bar a sentencing court from considering the acquitted conduct in imposing sentence"); *United States* v. *Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972).

The Sentencing Guidelines embrace those principles. Section 6A1.3 of the Guidelines provides that a district court may consider any reliable evidence at sentencing. Sentencing Guidelines § 6A1.3.[2] If there is a question about the reliability of the information available to the court, the Sentencing Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. *Ibid.* See *United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). No Sentencing

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[2] Section 6A1.3 (Policy Statement) provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

Guideline provides that evidence is barred from consideration on the ground that it concerns an offense of which the defendant was acquitted.

In arguing that the sentencing court erred in considering the facts underlying the charges on which they were acquitted, petitioners have overlooked the fact that different standards of proof apply at the guilt and sentencing stages of a criminal prosecution. Although the beyond-a-reasonable-doubt standard applies to the resolution of the question of the defendant's factual guilt or innocence at the guilt stage of a criminal prosecution, *In re Winship*, 397 U.S. 358 (1970), the Constitution does not require that the government prove facts relevant to sentencing to that degree of certainty. The preponderance standard satisfies due process for sentencing purposes. *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). An acquittal does not prove that the defendant was "innocent" of the charged crime, or that he did not commit the charged acts. An acquittal establishes only that the government did not prove the defendant's guilt beyond a reasonable doubt. A jury's finding that the government did not prove the existence of a fact beyond a reasonable doubt does not bar the government from attempting to prove the existence of that fact under the lower, preponderance standard of proof. *Dowling* v. *United States*, 493 U.S. 342, 348-350 (1990).[3] Accordingly, given the different standards

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[3] Indeed, an acquittal does not "necessarily even reflect a failure of proof on the part of the prosecution." *United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 332 & n.4 (5th Cir. 1980); *United States* v. *Price*, 750 F.2d 363, 365 (5th Cir.), cert. denied, 473 U.S. 904 (1985). Not guilty verdicts may result "from compromise, confusion, mistake, leniency or other legally and logically irrelevant factors." *United States* v.

of proof that apply at the two different stages of a criminal case, the Constitution does not bar a court at sentencing from finding facts that the jury rejected in the course of returning a not guilty verdict in an earlier prosecution. See, *e.g.*, *United States* v. *Moreno*, 933 F.2d 362, 374 (6th Cir. 1991); *United States* v. *Rodriguez-Gonzalez*, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); *United States* v. *Sweig*, 454 F.2d at 184.

Petitioners have not offered a good reason for adopting a different rule. They contend that a verdict of acquittal does not reveal "which portions, if any, of the evidence were disbelieved by the jury" and that allowing the trial judge to accept evidence that might have been discredited by the jury diminishes the jury's role. Pet. 12. But in light of the different burdens of proof that apply at the guilt and sentencing stages of trial, the sentencing judge need not attempt to divine what the jury believed; instead, the judge may conduct his own independent review of the evidence to determine, under the lesser standard applicable to sentencing, whether the conduct underlying the acquittal occurred.

In this case, the district court properly considered all of the evidence presented at trial under the preponderance standard, Pet. App. 44-45, and concluded that petitioners had failed to report income on their individual and partnership returns. Tr. 2755-2756.[4]

Price, 750 F.2d at 365; *United States* v. *Espinosa-Cerpa*, 630 F.2d at 332. See also *United States* v. *Powell*, 469 U.S. 57, 63, 65-69 (1984); *Standefer* v. *United States*, 447 U.S. 10, 22-23 (1980); *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932).

[4] The trial judge said that he had taken copious notes of the proceedings. He noted that the evidence he would consider had been subject to cross-examination. The judge also noted

Petitioners had an opportunity on cross-examination to challenge the evidence produced by the government and to present their own version of the facts. Pet. App. 45. And the sentencing judge had the opportunity to observe the witnesses. Thus, the district court properly found that the information was accurate and reliable. Pet. App. 30.[5]

Contrary to petitioners' contention, Pet. 13-15, the decision below does not conflict with *Hughey* v. *United States*, 110 S. Ct. 1979 (1990). The question in *Hughey* was whether a district court had the authority under the restitution provisions of the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579(a)(1) and 3580 (Supp. IV 1982), to require a defendant to make restitution for acts other than those underlying the offense of conviction. This Court held that by using the phrase "the amount of the loss sustained by any victim as a result of the offense," 18 U.S.C. 3579, Congress limited the amount of restitution to the loss resulting from the offense of conviction. 110 S. Ct. at 1983-1984. The Court reasoned that Congress's use of the phrase "the offense" referred to the offense of conviction and indicated that the amount of restitution should be tied to that offense. *Id.* at 1984. Unlike the Victim and Witness Protection Act of 1982, however, 18 U.S.C. 3661 manifests no legislative intent to restrict the evidence that a sentencing court may consider to the conduct underlying the offense of conviction. On the contrary,

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that he would consider evidence presented by the defense. Pet. App. 44-45.

[5] Indeed, facts adduced during trial may be more reliable than the hearsay evidence which courts may consider in determining an appropriate sentence. *United States* v. *Sweig*, 454 F.2d at 184.

that statute expresses Congress's intent that "[n]o limitation shall be placed" on the amount and type of information that a court may consider in devising an appropriate sentence.

2. Since the Sentencing Guidelines went into effect, nine courts of appeals (including the one below) have held that judges at sentencing may rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. *United States* v. *Mocciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States* v. *Rodriguez-Gonzalez*, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); *United States* v. *Ryan*, 866 F.2d 604, 608-609 (3d Cir. 1989); *United States* v. *Isom*, 886 F.2d 736 (4th Cir. 1989); *United States* v. *Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989); *United States* v. *Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); *United States* v. *Fonner*, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); *United States* v. *Dawn*, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 111 S. Ct. 389 (1990); *United States* v. *Averi*, 922 F.2d 765 (11th Cir. 1991). In *United States* v. *Brady*, 928 F.2d 844, 851-852 (9th Cir. 1991), however, the Ninth Circuit held that a judge may not depart upward from the Sentencing Guidelines range on the basis of a factual finding that the jury has necessarily rejected by its judgment of acquittal. The defendant in that case was acquitted of premeditated murder and assault with the intent to commit murder. He was convicted only of the lesser included offenses of voluntary manslaughter and assault with a deadly weapon. Over a dissent by Chief Judge Wallace, the panel majority held that the district court erred in finding that Brady acted with premeditation when the court sen-

tenced him for the offenses of conviction. In the majority's view, the question whether Brady acted with premeditation was resolved in his favor by the jury's verdict, and "[i]t would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." 928 F.2d at 851.

Although the Ninth Circuit's decision in *Brady* conflicts with the circuit court decisions cited above, this case is not an appropriate vehicle for resolving that conflict. The Ninth Circuit's decision in *Brady* involved an interpretation of the Sentencing Guidelines. See 928 F.2d at 851-852 & n.14. In this case, by contrast, the Sentencing Guidelines did not apply, because the offenses at issue here were committed before November 1, 1987, the effective date of the Sentencing Guidelines. There is no conflict among the circuits as to whether courts under the pre-Guidelines sentencing system could consider conduct that was the subject of an acquittal, and in any event that issue is one of rapidly diminishing importance, since there are relatively few cases remaining in which district courts are imposing sentence under the pre-Guidelines regime. While we believe that the conflict among the circuits with respect to a sentencing court's reliance on conduct that was the subject of an acquittal may well justify this Court's review in an appropriate case, we believe that the appropriate case would be one in which sentence was imposed under the Sentencing Guidelines, as it was in the *Brady* case, which generated the circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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